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In The

Supreme Court of the United States

LEONARD F. PRESCOTT, *et al.*,

Petitioners,

v.

LITTLE SIX, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN E. WOLTER
Counsel of Record for Petitioners
DOUGLAS A. KELLEY
KELLEY & WOLTER, P.A.
431 South Seventh Street, Suite 2530
Minneapolis, Minnesota 55415
(612) 371-0814

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether federal common law developed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, must yield to tribal corporate law to determine the enforceability of employee benefit plans established by an Indian tribal corporation in favor of its employees.

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PETITION FOR A WRIT OF CERTIORARI

Leonard Prescott, F. William Johnson and Peter Riverso respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-10) is reported at 387 F.3d 753 (8th Cir. 2004). The district court opinion (App. 11-25) is reported at 284 F. Supp.2d 1224 (2003).

JURISDICTION

The Eighth Circuit filed its decision on October 21, 2004, and entered an order denying petitioners' timely petition for rehearing on December 8, 2004. App. 26. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a) provides in part:

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the

terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1003(a) provides in part:

> Except as provided in subsection (b) of this section and in sections 1051, 1081 and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained –
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce.

29 U.S.C. § 1002(3) provides:

> The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

STATEMENT OF FACTS

Petitioners Leonard Prescott, F. William Johnson and Peter Riverso are former employees of respondent Little Six, Inc. (LSI). App. 2. LSI is a tribal corporation established by the Shakopee Mdewakanton Sioux (Dakota) Community, a federally recognized Indian tribe, to operate the community's on-reservation gaming activities. *Id.*

After several key employees departed for other jobs, LSI began exploring a variety of employee benefit plans to remain competitive in the marketplace. Working through outside counsel, LSI developed an executive benefits program consisting of five separate plans to provide pension and welfare benefits to eligible employees including

petitioners. During the plan drafting process, LSI's lawyers advised the corporation that ERISA applied in Indian country and would govern the plans. App. 19-20. Consequently, "LSI itself believed that the plans were subject to ERISA." App. 19.

As part of the administration of its benefit program, LSI prepared and distributed summary plan descriptions and individual benefit statements to petitioners and other plan participants. The summary plan descriptions for the LSI Life Insurance Plan, the LSI Separation Pay Plan and the LSI Supplemental Retirement Plan delineated the participants' "ERISA rights" and assured each that:

> 1. If you request materials from the Plan and do not receive them within 30 days, you may file suit in a federal court.
>
> 2. If you have a claim for benefits which is denied or ignored, in whole or part, you may file suit in a state or federal court.
>
> 3. If it should happen that plan fiduciaries misuse the Plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in a federal court.

App. 22-23.

After leaving LSI employment, petitioners requested benefit information and payment of benefits due them under the plans. When LSI refused to comply, petitioners brought suit in United States District Court seeking

benefits and penalties under 29 U.S.C. §§ 1132(a)(1)(B) and (c).[1]

Invoking the tribal exhaustion doctrine, the district court abstained from deciding the matter, dismissed the complaint and directed Petitioners to litigate the validity of the plans in the first instance before the tribal court. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995). The district court informed the parties, however, that after tribal remedies were exhausted the tribal court's determinations of federal law would be subject to *de novo* review by the federal courts. *Id.* at 1224, n.6.

The tribal trial court conducted a three-day hearing and found that all of the plans were validly created and approved as a matter of law by the LSI board of directors. App. 18. In reaching its decision, the tribal trial court made numerous factual findings. It found, *inter alia*, that cash benefits were paid under the plans to other participants, that amounts were credited to deferred accounts for plan participants and that money was transferred by LSI to a trust from which assets were disbursed to satisfy benefit claims made under the plans. *Id.*

Despite acknowledging that the plans existed in some form, LSI appealed to the tribal court of appeals. Significantly, LSI mounted no challenge to the factual findings made by the tribal trial court in its appeal. App. 20.

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[1] ERISA federalizes claims to collect benefits due, enforce rights under covered plans and to clarify future rights to plan benefits but confers concurrent jurisdiction on state and federal courts to decide such claims. 29 U.S.C. § 1132(a)(1)(B). Actions against a plan administrator for failure to supply requested information that it is required to provide to plan participants under ERISA remain subject to exclusive federal jurisdiction. 29 U.S.C. § 1132(e)(1).

Instead, LSI argued that its inability to locate an original corporate resolution signed by the LSI board of directors formally adopting the plans rendered its promises of benefits unenforceable. App. 18.

The tribal court of appeals sided with LSI. After adopting the tribal trial court's findings of fact, the tribal appeals court held that to recognize the plans without a formal board resolution would ignore the "carefully crafted body of law" established by the tribal corporate code. App. 19. Focusing on technical formalities ostensibly required by tribal law, the tribal court of appeals reversed the tribal trial court and dismissed all of Petitioners' claims. *Id.*

Petitioners renewed their complaint before the federal district court and sought review of the tribal court's interpretation of federal law. The district court held that federal law rather than tribal law supplies the appropriate standard for determining whether an ERISA plan exists. App. 24-25. Finding both that the plans had been adopted under federal law and that LSI had waived its sovereign immunity from suit in three of the plans, the district court denied, in part, LSI's motion to dismiss the complaint. App. 24-25.

LSI appealed to the Eighth Circuit Court of Appeals. App. 1-10. After concluding that LSI's adoption of a valid and enforceable benefits arrangement is an issue governed by tribal law, the Eighth Circuit reversed the district court's order and dismissed petitioners' complaint in its entirety. App. 8.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT: DOES FEDERAL LAW EXCLUSIVELY GOVERN WHETHER AN EMPLOYER HAS ESTABLISHED OR MAINTAINED A PLAN OR BENEFIT ARRANGEMENT FOR PURPOSES OF ERISA?

Congress enacted ERISA to provide uniform federal standards for establishing and maintaining employee pension and benefit plans. One of ERISA's express goals is to "protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans and by providing for appropriate remedies, sanctions and ready access to the Federal courts." 29 U.S.C. § 1001(b).

Stated differently, ERISA seeks to "protect working men and women from abuses in the administration of private retirement plans and employee welfare plans," *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), and to prevent the "great personal tragedy" suffered by employees whose vested benefits are not paid. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quoting 3 Leg. Hist. 4793, Senator Bentsen). Through the passage of ERISA, Congress sought to insure that when an employer promises an employee a pension benefit upon retirement, and the employee fulfills the required conditions, then the employee will actually receive the promised benefit. *Id.* at 374-75.

To safeguard employee benefit rights and spare employers from the difficulty of having to comply with a variety of conflicting and inconsistent regulations, ERISA

broadly preempts state and local laws that otherwise would affect covered plans. 29 U.S.C. § 1144(a); *Shaw v. Delta Air Lines*, 463 U.S. 85, 90-91 (1983). This Court has recognized that in establishing ERISA Congress intended:

> to ensure that [ERISA] plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government, and to prevent the potential for conflict in substantive law requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656-57 (1995) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)).

ERISA reaches all employee benefit plans that are established or maintained by an employer engaged in activities affecting interstate commerce and which provide pension or welfare benefits. 29 U.S.C. § 1003(a). No particular formalities or form of writing are required to establish an ERISA plan. *Donovan v. Dillingham*, 688 F.2d at 1372. Accordingly, courts have upheld informal, or *de facto*, plans in order to protect the legitimate expectations of employees who were promised plan benefits and reasonably relied on their employers' assurances that they would receive the same. *See, e.g., Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502-04 (9th Cir. 1985); *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F. Supp. 454 (S.D.N.Y. 1988). At bottom, a plan need only invoke an "ongoing administrative program," *Fort Halifax Packing Co. v. Coyne*, 482

U.S. 1, 12 (1987), and be a "reality." *Donovan v. Dillingham*, 688 F.2d at 1373.

Since the statutory text of ERISA offers no guidance for determining if a plan has been "established or maintained," courts have looked to the facts and circumstances surrounding a benefit arrangement to discern whether an employer's promises are enforceable. *Id.* ("it is the reality of a plan, fund or program and not the decision to extend benefits that is determinative.").

The *Donovan* court was one of the first courts to consider the type of circumstances from which the existence of an ERISA plan may be inferred. In a well-reasoned decision, the Eleventh Circuit Court of Appeals, sitting *en banc*, developed the following test, which has since been consistently followed in ERISA litigation:

> In determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, sources of financing and procedures for receiving benefits.

688 F.2d at 1373.

The *Donovan* approach has been adopted by all of the federal circuits. *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990); *Grimo v. Blue Cross/Blue Shield of Vt.*, 34 F.3d 148, 151 (2nd Cir. 1994); *Henglein v. Informal Plan for Plant Shutdown Benefits*, 974 F.2d 391, 399 (3rd Cir. 1992); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240-41 (5th Cir. 1990); *Brown v.*

Amco-Pittsburgh Corp., 876 F.2d 546, 551 (6th Cir. 1989); *James v. National Business Systems, Inc.*, 924 F.2d 718, 720 (7th Cir. 1991); *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *Peckham v. Gem State Mut. Of Utah*, 964 F.2d 1043, 1047-48 (10th Cir. 1992); *Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 1254, 1257-58 (D.C. Cir. 1994).

State courts likewise follow the *Donovan* test to determine whether an employer has established an ERISA plan. *See, e.g., Marshall v. Bankers Life & Cas. Co.*, 2 Cal. 4th 1045, 832 P.2d 573, 578 (Cal. 1992) (*en banc*), *cert. denied*, 506 U.S. 1000 (1992); *Matter of Estate of Bickford*, 549 N.W.2d 804, 806 (Iowa 1996); *Vulcan v. United of Omaha Life Ins. Co.*, 715 A.2d 1169, 1176 (Penn. Super. 1998); *Medley v. A.W. Chesterton Co.*, 912 S.W.2d 748, 750-51 (Tenn. App. 1995); *Shaw v. PACC Health Plan, Inc.*, 130 Or. App. 32, 881 P.2d 143, 146 (Or. App. 1994), *aff'd*, 322 Or. 392, 908 P.2d 308 (Or. 1995); *Robertson v. Gem Ins. Co.*, 828 P.2d 496, 502 (Utah App. 1992); *Time Ins. Co. v. Roberts*, 191 Ga. App. 766, 382 S.E.2d 718, 719 (Ga. App. 1989).

Here, the tribal trial court also looked to the *Donovan* test for guidance. The tribal trial court considered evidence presented during a three-day evidentiary hearing at which ten witnesses testified and thousands of pages of documents were admitted. Thereafter, it made factual findings specifically determining that the plans at issue were a reality for both LSI and its employees. App. 18. The tribal trial court further found that LSI had assembled an ongoing administrative program through which it processed and paid actual cash benefits to other participants under the plans. App. 19. LSI has conceded the evidentiary support for the tribal trial court's findings and does

not dispute the soundness of that court's factfinding. App. 20. More importantly, the tribal court of appeals also accepted the validity of the tribal trial court's findings of fact without question. App. 18.

In concluding that the actual reality of the plans, as opposed to any paper formality, is dispositive, the tribal trial court followed firmly entrenched federal law. Its approach was wholly consistent with ERISA's underlying policy of protecting plan participants from employer abuses and prohibiting plan sponsors from shirking their obligations through the conscious or inadvertent failure to formally adopt a written plan. *Donovan v. Dillingham*, 688 F.2d at 1372 ("it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans . . . to circumvent the Act merely because an administrator . . . failed to satisfy reporting or fiduciary standards").

By contrast, the tribal court of appeals, and later the Eighth Circuit, ignored relevant legislative history and overwhelming case authority that seeks to protect plan participants while contemporaneously elevating corporate form over substance to reject the plans and the claims that petitioners' assert thereunder. That technically driven, myopic approach not only pulls the rug out from under benefits promised to Petitioners upon which they reasonably relied, *see Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1409 (2nd Cir. 1985), but also contravenes ERISA's quest for national uniformity in the field of benefit regulation.

No other reported decision has looked to non-federal law to decide whether an ERISA plan was established or maintained. Instead, when state courts have invoked

concurrent jurisdiction to consider ERISA issues, they have uniformly looked to federal law to reach their decisions. *See, e.g., Montner v. Interfaith Medical Center*, 596 N.Y.S.2d 975, 981 (1993) ("in exercising concurrent jurisdiction, state courts are to apply federal law"); *Brown v. Zurich U.S.*, 779 N.E.2d 822, 827 (Ohio. App. 2002) (same).

Unquestionably, a primary purpose of ERISA is to protect individual pension rights. *Harley v. Minnesota Mining and Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (citing H.R.Rep. No. 533, 93rd Cong., 2nd Session 1 (1974)). The primary means of insuring that protection is to permit plan participants and beneficiaries to bring suit to collect unpaid benefits. This court has recognized the "deliberate care with which ERISA's civil enforcement remedies were drafted" while acknowledging that benefit claims arise under federal law. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54-55 (1987) (citing H.R. Conf. Rep. No. 93-1280, p. 327 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5107). Indeed, Congress considered the reservation of ERISA plan regulation to federal law to be "the crowning achievement" of the Act. 120 Cong. Rec. 29197 (remarks of Sen. Javits). Only by maintaining a uniform, national approach to resolving ERISA disputes through the application of clearly defined federal common law can this Congressional mandate be fulfilled.

By granting certiorari, this Court can both remedy the error below and provide clear guidance to all other ERISA plan sponsors, beneficiaries, and courts directing that the issue of plan existence is a question of federal law that must be decided using the test set forth in *Donovan*.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

STEVEN E. WOLTER
Counsel of Record for Petitioners
DOUGLAS A. KELLEY
KELLEY & WOLTER, P.A.
431 South Seventh Street,
Suite 2530
Minneapolis, Minnesota 55415
(612) 371-9090

March 7, 2005

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-3702

Leonard F. Prescott, F. William Johnson, Peter Riverso, Appellees, v. LITTLE SIX, INC., in its capacity as plan administrator for the Little Six, Inc., Executive 457 Plan, the Little Six, Inc., Supplemental Retirement Plan, the Little Six, Inc., Life Insurance Plan, the Little Six, Inc., Separation Pay Plan and the Little Six, Inc., Retention Plan; The Little Six, Inc., Supplemental Retirement Plan; The Little Six, Inc., Life Insurance Plan; The Little Six, Inc., Separation Pay Plan; The Little Six, Inc., Retention Plan; The Little Six, Inc., Executive 457 Plan, Appellants.	*	Appeal from the United States District Court for the District of Minnesota.

Submitted: June 16, 2004
Filed: October 21, 2004

Before WOLLMAN, HEANEY, and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Little Six, Inc. ("LSI"), a corporation organized pursuant to the laws of the Shakopee Mdewakanton Sioux (Dakota) Community Indian tribe ("the Tribe"), appeals the decision of the District Court denying LSI's motion to dismiss claims brought by former executive employees of LSI for payment of benefits under employee benefit plans purportedly created by LSI. Because we determine that the District Court erred in not giving proper deference to a tribal court finding that the plans were not authorized under tribal law, we reverse and remand the case to the District Court and direct that the lawsuit be dismissed.

The Tribe created LSI in 1992 as a tribal corporation responsible for operating casinos owned by the Tribe pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000). The Plaintiffs, Leonard Prescott, F. William Johnson, and Peter Riverso, are former employees of LSI who served as chief executive officer, chief operations officer, and senior vice president, respectively. In late 1992 and early 1993, the Plaintiffs drafted certain employee benefit plans to be made available to executive-level employees of LSI (including the Plaintiffs). The LSI board of directors discussed the draft benefit plans at a number of meetings but never formally approved the plans. In 1994, following a tribal election, the LSI board of directors was replaced in its entirety. Shortly thereafter, the new LSI board of directors passed a resolution specifically refusing to adopt the draft benefit plans.

The Plaintiffs, nevertheless, sought payment of benefits under the draft plans from trusts that had been created in association with the draft plans. LSI took the position that both the draft plans and the trusts were not validly created and that the trust funds should be returned to LSI. In the face of these conflicting claims, the trustees of the trust filed an interpleader complaint in the Court of the Shakopee Mdewakanton Sioux (Dakota) Community, seeking the court's guidance about the legal status of the draft plans and the appropriate distribution of assets in the trust.

While the tribal court action was pending, the Plaintiffs brought suit in federal district court under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1053 (2000) ("ERISA"), seeking benefits under the plans and equitable relief. The district court dismissed the action, holding that the Plaintiffs were required to exhaust their tribal remedies before the district court could exercise jurisdiction. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1222 (D. Minn. 1995). The Plaintiffs then intervened in the ongoing tribal court action. The tribal trial court concluded that, though there was no written record memorializing approval of the plans by the LSI board of directors, the "actual reality" was that the plans had been approved and were valid. The tribal trial court further determined that the plans were governed by ERISA and that it had no jurisdiction over the Plaintiffs' ERISA claims. LSI appealed the tribal trial court decision to the Shakopee Mdewakanton Court of Appeals.

The tribal court of appeals reversed the tribal trial court, ruling that the plans were never formally adopted under the corporate laws of the Tribe. Because the plans would increase officer compensation, the LSI Articles of

Incorporation[1] required that the plans be formally adopted by the LSI board of directors to become effective. As the plans were never adopted by the board, no plans were created. Finding that nonexistent plans cannot impose liability on LSI under either ERISA or tribal law, the tribal court of appeals dismissed the Plaintiffs' claims.

The Plaintiffs then filed the instant action against LSI, alleging that the plans had been adopted by the LSI board of directors (and therefore "existed") and that the plans were governed by ERISA. LSI filed a motion to dismiss on three alternative grounds: (1) that LSI possesses tribal sovereign immunity from suit, which LSI did not waive; (2) that the federal court must defer to the tribal appeals court's determination that no ERISA plans were created; and (3) that the federal court lacks subject matter jurisdiction because ERISA does not apply to LSI. The District Court rejected each of these arguments and denied LSI's motion to dismiss. This appeal, in which LSI essentially makes the same arguments in support of reversing the District Court's denial of dismissal, followed.

The denial of a motion to dismiss is not generally a final order subject to immediate appeal. *See* 28 U.S.C. § 1291 (2000). In this case, however, we have jurisdiction under the collateral order doctrine, which permits an interlocutory appeal from a district court's denial of sovereign immunity. *See Moreno v. Small Bus. Admin.*, 877 F.2d 715, 716 (8th Cir. 1989) (ruling that "a rejection

[1] The LSI Articles of Incorporation are incorporated into the Shakopee Mdewakanton Sioux Community Amended Corporation Ordinance.

of a claim for absolute or qualified immunity is immediately appealable"); *see also Osage Tribal Council v. Department of Labor,* 187 F.3d 1174, 1179 (10th Cir. 1999) (ruling that "the denial of tribal immunity is an immediately appealable collateral order"), *cert. denied,* 530 U.S. 1229 (2000); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 63 F.3d 1030, 1050 (11th Cir. 1995) (ruling that the collateral order doctrine applies to denial of tribal sovereign immunity). In addition, we have pendent appellate jurisdiction to decide "closely related" issues of law, i.e., claims that are "inextricably intertwined with" or "necessary to ensure meaningful review of" the sovereign immunity issue. *Kincade v. City of Blue Springs, Missouri,* 64 F.3d 389, 394 (8th Cir. 1995) (internal quotations and citations omitted), *cert. denied,* 517 U.S. 1166 (1996).

Our jurisdiction to address LSI's sovereign immunity claim is without doubt. We also conclude that we have jurisdiction to address LSI's assertion that the District Court erred in not deferring to the tribal appeals court's determination that no benefit plans were created. This argument is "inextricably intertwined with" the issue of whether LSI waived sovereign immunity through language in the draft benefit plans, as asserted by Plaintiffs Riverso and Johnson. If the draft benefit plans were never approved, it follows that LSI did not waive sovereign immunity in the plans. Thus, it is necessary for us to address LSI's argument that the tribal appeals court's order was entitled to deference before we can determine whether there is a need to review the sovereign immunity issue.[2] Because we agree with LSI that the District Court

[2] This ruling, while based on the pendent appellate jurisdiction standards set forth in *Kincade,* is consistent with our pre-*Kincade* cases

(Continued on following page)

erred in not deferring to the tribal appeals court's determination that no benefit plans were created, we need not address LSI's assertion that LSI is immune from suit nor LSI's remaining assertions on appeal.

We review a district court's decision to deny or grant a motion to dismiss under a de novo standard of review. *See Harris v. Epoch Group,* 357 F.3d 822, 824-25 (8th Cir. 2004).

The Supreme Court has repeatedly recognized Congress's commitment to a "policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 856 (1985); *see also Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1986) (citing cases). Consistent with this policy, the Supreme Court has determined that "tribal courts are best qualified to interpret and apply tribal law." *Iowa Mutual,* 480 U.S. at 16. Thus, in this Circuit, we "defer to the tribal

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holding that questions of law which will dispose of the necessity to address an assertion of immunity are "closely related issues of law" that are properly before the Court on interlocutory appeal. *See Moreno,* 877 F.2d at 716-17 ("Resolution of the constitutional claim and the common-law tort claims will dispose of the immunity questions, and we may therefore address them."); *Drake v. Scott,* 812 F.2d 395, 398-99 (8th Cir. 1987) (holding that the claim that the plaintiff owned no property interest was subject to pendent appellate jurisdiction because, if true, "the question of qualified immunity would drop out of the case [and] would never have to be reached"), *cert. denied,* 484 U.S. 965 (1987).

Moreover, this ruling is supported by the law governing immunity claims in the analogous context of civil rights actions filed against government officials. The Supreme Court has ruled that courts must consider the "threshold question" of whether the official violated a constitutional right before addressing the issue of qualified immunity. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

courts' interpretation" of tribal law. *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 559 (8th Cir. 1993) (deferring to tribal court's decision that the tribal constitution gave the tribal court personal jurisdiction over non-Indians), *cert. denied,* 512 U.S. 1236 (1994); *see also Duncan Energy v. Three Affiliated Tribes,* 27 F.3d 1294, 1300 (8th Cir. 1994) ("The Tribal Court's determinations of federal law should be reviewed *de novo* while determinations of Tribal law should be accorded more deference."), *cert. denied,* 513 U.S. 1103 (1995). Similarly, a tribal court's findings of fact are reviewed under a "deferential, clearly erroneous standard." *Duncan Energy,* 27 F.3d at 1300. It is only when the tribal court applies federal law that the tribal court's determinations are accorded no deference and are reviewed by the district court de novo.[3] *Id.*

The Plaintiffs argued, and the District Court agreed, that the legal status of the draft benefit plans is governed by federal law. The District Court thus accorded no deference to the decision of the tribal appeals court and instead applied a de novo standard of review. The District Court determined that the tribal court erred in concluding that no plans existed under which LSI could be subject to ERISA liability. In reaching the conclusion that the legal status of the plans is a question of federal law subject to de novo review, the District Court relied on our decision in *Kulinski v. Medtronic Bio-Medicus, Inc.,* 21 F.3d 254, 256

[3] Although a federal court may also perform a de novo review of a tribal court's determination of its own jurisdiction, *Duncan Energy,* 27 F.3d at 1300, the District Court here explicitly recognized that "the tribal court had jurisdiction to consider the *status vel non* of the ERISA plans." *Prescott v. Little Six, Inc.,* 284 F. Supp. 2d 1224, 1228 (D. Minn. 2003).

(8th Cir. 1994). *See Prescott v. Little Six, Inc.*, 284 F. Supp. 2d at 1229. The District Court's application of *Kulinski* was erroneous.

In *Kulinski,* the issue of whether or not an employer entered into an agreement obligating the employer to pay compensation benefits was not before the court on appeal. It is true that Kulinski's employer argued in the district court that an agreement entitling Kulinski to compensation benefits was invalid because it was not approved by the employer's board of directors (an argument that the district court rejected). *See Kulinski,* 21 F.3d at 255-56. On appeal, however, this Court did not address the validity and existence of the benefits agreement, but only whether the district court properly deemed the agreement an ERISA "plan." *Id.* at 258. It was this second issue of whether or not a valid agreement for benefits compensation is a "plan" subject to ERISA to which this Court applied federal law. After discussing caselaw from our sister circuits, we ruled that an ERISA "plan" only exists if the benefits arrangement requires the establishment of a separate, ongoing administrative scheme to administer the promised benefits. *Id.* at 257-58.

In this action, of course, the courts were not required to reach this subsequent issue of whether a valid benefits arrangement became a "plan" subject to ERISA. Rather, the initial, and dispositive, issue addressed was whether a valid and enforceable benefits arrangement existed. The tribal appeals court properly determined that the legal status of the LSI draft benefit plans was a matter governed by tribal law. LSI is a branch of the sovereign tribal government, created under Article V of the Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota. As such, LSI is subject to the Tribe's laws governing

corporations as set out in the Shakopee Mdewakanton Sioux Community Amended Corporation Ordinance ("Corporation Ordinance"). The Corporation Ordinance permits tribal corporations to delineate operating rules in Articles of Incorporation. Corporation Ordinance, § 4.012. As recognized by the tribal appeals court, LSI's Articles of Incorporation specifically address the manner in which officer compensation may be fixed. Restated Articles of Incorporation of Little Six, Inc., § 8.6.

Interpreting these tribal laws, the tribal appeals court determined that benefit plans that have the effect of increasing LSI officer compensation must be adopted by the LSI board of directors. *In re: Trust Under Little Six, Inc. Retirement Plans,* No. 024-00, *6 (SMS(D)C Ct. App. Oct. 26, 2001). As discussed above, we must defer to this interpretation of tribal law. Turning to the facts of the case, the tribal appeals court then found that "there is no evidence in the record that the LSI Board adopted these plans or the trust in conformance with Community law." *Id.* at *5. To the contrary, in early 1995, the new LSI board of directors "passed a resolution . . . specifically stating that it had never adopted or approved any of the benefit plans involved in this dispute." *Id.* at *4. Accordingly, the tribal appeals court found that benefit plans were never created and thus ERISA liability could not arise. After reviewing the record before us, we cannot say that the tribal appeals court committed clear error in making these findings. We therefore defer to the tribal appeals court's determination that, as a matter of tribal law, no benefit arrangement was created.

Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply. For the reasons stated, we reverse the order of the District

Court and remand the case with instructions that it be dismissed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 02-4741 (DSD/SRN)

Leonard Prescott,
F. William Johnson,
and Peter Riverso,

Plaintiffs,

v. **ORDER**

LITTLE SIX, INC., in its capacity as plan administrator for the Little Six, Inc. Executive 457 Plan, the Little Six, Inc. Supplemental Retirement Plan, the Little Six, Inc. Life Insurance Plan, the Little Six, Inc. Separation Pay Plan and the Little Six, Inc. Retention Plan; the Little Six, Inc. Executive 457 Plan; the Little Six, Inc. Supplemental Retirement Plan; the Little Six, Inc. Life Insurance Plan; the Little Six, Inc. Separation Pay Plan; and the Little Six, Inc. Retention Plan,

Defendants.

Douglas A. Kelley, Esq., Steven E. Wolter, Esq. and Kelley Law Office, 2530 Centre Village Offices, 431 South Seventh Street, Minneapolis, MN 55415, counsel for plaintiffs.

Steven F. Olson, Esq. and BlueDog, Olson & Small, 5001 80th Street West, Suite 500, Bloomington, MN 55437, counsel for defendants.

This matter is before the court upon defendants' objections to the report and recommendation of United

States Magistrate Judge Susan R. Nelson, dated August 4, 2003. Defendants object to the report and recommendation on three grounds: (1) that the court lacks subject matter jurisdiction over plaintiffs' claims because the Employee Retirement Income Security Act of 1974 ("ERISA") does not apply to defendants, (2) that the court must defer to the determination of the Shakopee Mdewakanton Sioux (Dakota) Community Court that no ERISA plan exists, and (3) that defendants possess tribal sovereign immunity which has not been waived. After *de novo* review, the court adopts the magistrate judge's report and recommendation in part.

A. Application of ERISA to Little Six, Inc. ("LSI")

The court agrees with the magistrate judge's determination that ERISA applies to defendants. As the magistrate judge correctly explained, LSI is subject to ERISA unless an exception to the *Tuscarora* rule applies. *See Fed. Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99 (1960); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.,* 986 F.2d 246, 248 (8th Cir. 1993). After due consideration, the magistrate judge determined that no exception to the *Tuscarora* rule applies. (R & R at 17.)

Defendants argue that the *Tuscarora* rule does not apply because LSI engages in "governmental activity." (Defs.' Obj. at 3.) Defendants' argument is, at first, puzzling because there exists no blanket exception to the *Tuscarora* rule for tribal entities that engage in governmental activity. Defendants apparently intend their discussion of "governmental activity" to serve as shorthand for the proposition that, in this circuit, "areas traditionally left to tribal self-government," such as matters

which are "strictly internal," "have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." *Fond du Lac,* 986 F.2d at 248.

Thus construed, defendants' argument fails. *Fond du Lac* involved an age discrimination claim brought by a tribal member against a tribal entity. 986 F.2d at 249. The case recognizes that federal courts should not intrude into disputes that are wholly internal to the tribe. *See id.* at 249. For the reasons stated in her report and recommendation, Magistrate Judge Nelson correctly concluded that LSI's alleged conduct has extramural effects and that defendants have otherwise failed to show how application of ERISA to the facts of this case would affect the Community's inherent right of self-government. Further, as a matter of common sense, it is unlikely that the "culture and traditions" of the Dakota nation have as much to say on the subject of employee benefit plans, an innovation of the last century, as they would regarding the appropriate age for a tribal member to retire from work. *See id.* at 249. Defendants' objection therefore fails.[1]

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[1] Defendants complain that the magistrate judge dismissed in a single footnote their argument that Opinion Letter 81-3 of the Pension Benefit Guaranty Corporation ("PBGC"), issued March 4, 1981, compels the conclusion that ERISA does not apply to LSI. Defendants argued before Magistrate Judge Nelson that PBGC opinion letters are entitled to *Chevron* deference (Defs.' Mem. in Supp. of Mot. to Dismiss at 8). *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984) (where statute is silent or ambiguous, agency interpretation controls if "permissible").

PBGC disagrees. In Opinion Letter 87-7, issued three years after *Chevron* was decided, PBGC acknowledges that its opinion letters "are not binding on the public or on the courts" and that they are, in any event, entitled only to *Skidmore* deference. Priv. Ltr. Rul. 87-7 (Pension

(Continued on following page)

B. *Status vel non* of the ERISA plans

Defendants next object that this court must defer to the ruling of the Court of Appeals for the Shakopee Mdewakanton Sioux Community that no ERISA plans exist. The magistrate judge correctly determined that, because tribal court jurisdiction is a matter of federal law, a federal district court has subject matter jurisdiction to review whether a tribal court's exercise of its jurisdiction was proper. *See Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994). The magistrate judge also rightly concluded that the question of the tribal court's jurisdiction, as well as other questions of federal law decided by the tribal court, are reviewed by the district court *de novo. See id.* at 1300. However, the magistrate judge stopped short of determining whether the tribal court was correct in its conclusion that no ERISA plan was formed, deciding it would be inappropriate to decide that question without the benefit of the full record before the tribal court. After *de novo* review, the court respectfully disagrees with the magistrate judge's conclusion, and holds, for reasons set forth below, that it is proper to dispose of the question of the *status vel non* of the ERISA plans at this time.

Benefit Guar. Corp. Jul. 21, 1987) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944) (weight of agency authority "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control")). Even were this not so, the extramural effects cited by the magistrate judge are more than sufficient to remove this case from the factual situation presented in Opinion Letter 81-3. *See* Priv. Ltr. Rul. 81-3 (Pension Benefit Guar. Corp. Mar. 4, 1981).

A review of the procedural history of this matter is in order. Plaintiffs first brought their ERISA claims before this court in the mid-1990s. That round of federal litigation was terminated when Judge Kyle ordered the case dismissed under the doctrine of exhaustion of tribal remedies. *See Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995). Judge Kyle assumed, but did not decide, that the Mdewakanton Sioux tribal courts had jurisdiction to consider whether the ERISA plans under which plaintiffs claimed relief existed. *See id.* at 1224 ("The tribal court presumptively has jurisdiction to determine whether LSI's plans are valid ERISA plans."); *see also Int'l Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1269 (8th Cir. 1995) ("ERISA nowhere makes federal courts the exclusive forum for deciding the ERISA *status vel non* of a plan"), *quoted in Prescott*, 897 F. Supp. at 1222.

Plaintiffs did as directed by Judge Kyle and brought their dispute before the court of the Shakopee Mdewakanton Sioux Community. (Compl. Ex. 6.) After a hearing, that court reached several conclusions. First, the court implicitly determined that it did have jurisdiction to determine whether the putative plans exist. (Compl. Ex. 6.) Second, the court found that the plans exist. (Compl. Ex. 6 at 5-6.) Third, the court held that the plans were governed by ERISA and that, therefore, the court was deprived of jurisdiction to continue the matter further. (Compl. Ex. 6 at 6.)

Defendants then took their appeal to the Court of Appeals for the Shakopee Mdewakanton Sioux Community. (Compl. Ex. 7.) That court reversed and held that, as a matter of tribal corporate law, the plans could not exist without evidence that they had been formally approved by LSI's board of directors in conformance with LSI's articles

of incorporation. (Compl. Ex. 7 at 6-8.) Apparently, no further appeal was available to the plaintiffs under the laws of the Community. Plaintiffs, having thus exhausted their tribal remedies, now return to federal court to seek review of the tribal court's rulings.

Once tribal remedies have been exhausted, the first question for the district court is whether the tribal court's exercise of its jurisdiction was proper. *See Duncan Energy,* 27 F.3d at 1300. Accordingly, after *de novo* review, the court affirms that which Judge Kyle presumed and the tribal court held: the tribal court had jurisdiction to consider the *status vel non* of the ERISA plans. "Although federal courts have exclusive jurisdiction to award equitable relief under 29 U.S.C. § 1132(a)(3), federal courts do not have exclusive jurisdiction to determine whether an ERISA plan exists." *Prescott,* 897 F. Supp. at 1222. To date, Congress has displayed no intent to remove that question from tribal jurisdiction, and, "because the tribe retains all inherent attributes of sovereignty that have not been divested by the federal government, the proper inference from silence is that the sovereign power remains intact." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987).

Defendants, recognizing that our jurisdiction over this matter evaporates once the plans are deemed not to exist for purposes of ERISA, would end the inquiry there. Defendants quote *Iowa Mutual* for the proposition that, "[u]nless a federal court determines that the Tribal Court lacked jurisdiction . . . , proper deference to the Tribal Court system precludes relitigation of issues raised in the Tribal Court." (Defs.' Obj. at 2.)

Defendants are partially correct. As the Eighth Circuit Court of Appeals explained in *Duncan Energy,*

Iowa Mutual requires that federal courts review tribal courts' findings of fact "under a deferential, clearly erroneous standard." *Duncan Energy,* 27 F.3d at 1300. Likewise, the federal court must also accord deference to determinations of tribal law. *See id.* at 1300. A tribal court's determinations of federal law, however, are accorded no deference and are reviewed by the district court *de novo. See id.* at 1300.

As correctly observed by the magistrate judge, the question of the *status vel non* of an ERISA plan is a mixed question of law and fact in this circuit. *Kulinski v. Medtronic Bio-Medicus, Inc.,* 21 F.3d 254, 256 (8th Cir. 1994). The law which is to be applied to the question is federal law. *See id.* at 256-57. The appropriate standard is supplied by the ERISA statute interpreted in accordance with relevant precedent of the Supreme Court of the United States and this circuit. *See id.* at 256-57.

Having determined that the question of the *status vel non* of the ERISA plans is reviewable because it involves application of federal law, the court must determine whether it is appropriate to conduct that review at this stage of the litigation. The question of the existence of the plans under ERISA merges with the question of the court's jurisdiction over the subject matter of this action. *See Kulinski,* 21 F.3d at 256. If there is insufficient evidence to establish the existence of at least one plan, the court must dismiss the case. *See id.* at 256.

"[B]ecause jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial. . . . " *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990). The only exception to this principle is triggered when "the jurisdictional

issue is 'so bound up with the merits that a full trial on the merits may be necessary to resolve that issue.'" *Id.* at 730 (quoting *Crawford v. United States,* 796 F.2d 924 (7th Cir. 1986)). The magistrate judge was of the opinion that this narrow exception should apply to delay review of the tribal court's decision until the full transcript of those proceedings is before the court. (R & R at 36.) After considering what should be the appropriate scope of that review in the post-exhaustion posture of this case, however, the court respectfully disagrees.

One of the purposes of the doctrine of exhaustion of tribal remedies is to further "the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut.,* 480 U.S. at 14. Toward that end, it is incumbent upon the federal courts to show proper respect for the findings of tribal courts on matters of fact and the conclusions of those courts on questions of tribal law. *See Duncan Energy,* 27 F.3d at 1300. Plaintiffs have placed the opinions of both the tribal trial and appellate courts before this court. (Compl. Exs. 6 & 7.)

The tribal trial court conducted a three-day evidentiary hearing. (Compl. Ex. 6 at 3.) From the face of its opinion and order, it is apparent that the court credited certain evidence, did not credit other evidence, and made findings of fact regarding the reality and operation of the plans. (Compl. Ex. 6.) On review, the Court of Appeals did not challenge the validity of the trial court's factual findings. (Compl. Ex. 7.) Rather, it ruled that the trial court had erred as a matter of tribal law and that no ERISA plans existed because there was no evidence that the plans had been adopted by the LSI board in conformance with the technical requirements of LSI's articles of incorporation. (Compl. Ex. 7 at 6-8.) The court observed

that to hold that the plans existed in the absence of such formalities "would be to ignore the carefully crafted body of corporate law laid out in [the] Community's Corporation Ordinance and in LSI's Articles of Incorporation." (Compl. Ex. 7 at 6.)

In so holding, the appellate court erred as a matter of federal law. As previously discussed, the standard for the existence of an ERISA plan is supplied by federal, not tribal, law. *See Kulinski,* 21 F.3d at 256-57. "Whether an ERISA plan exists . . . may be determined by whether the employer requires 'an ongoing administrative program to meet [its] obligation.'" *Eide v. Grey Fox Technical Services Corp.,* 329 F.3d 600, 605 (8th Cir. 2003). An ongoing administrative program "is necessary when 'to determine the employees' eligibility for and level of benefits [the employer] must analyze each employee's particular circumstances in light of the appropriate criteria.'" *Id.* at 605 (quoting *Kulinski,* 21 F.3d at 257).

In this case, the tribal trial court found that LSI actually assembled such an administrative program. The court determined that the evidence showed "that until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under all five Plans." (Compl. Ex. 6 at 9.) The court also found that "[t]he evidence shows that each of the Plans included more beneficiaries than just the [plaintiffs]" and that LSI established and periodically transferred money into a trust in order to meet its continuing obligations to participants in the plans. (Compl. Ex. 6 at 9-10.) Assets from the trust were actually disbursed to satisfy claims under three of the five plans. (Compl. Ex. 6 at 10.) Finally, the court noted that the written material accompanying the plans

indicated that LSI itself believed that the plans were subject to ERISA. (Compl. Ex. 6 at 10.)

Defendants have not suggested, either before the magistrate judge or in their objections to her report and recommendation, that the findings of the tribal trial court are unsound.[2] In the absence of such a claim, sound principles of comity caution the court against re-weighing the evidence. *See Duncan Energy,* 27 F.3d at 1300 (federal court should not set aside factual findings of tribal court unless clearly erroneous). Therefore, the court finds that it would be fruitless to wait for the parties to deposit the full transcript. Applying the correct legal standard to the facts as found by the tribal court, the court holds that the each of the five plans exists and is governed by the dictates of ERISA.

C. Sovereign Immunity

The court agrees with and adopts the magistrate judge's discussion of sovereign immunity and conclusion that LSI possesses no such immunity from suit with respect to claims brought by plaintiff Prescott because Prescott is a Community member. Article 3.1 of LSI's articles of incorporation states that LSI's immunities "shall not extend to actions against [LSI] by the Community or any voting member of the Community." (Aff. of Steven F. Olson Ex. B at 1). Regardless of whether that language is construed as a waiver of sovereign immunity or a limitation of the immunities conferred upon LSI by

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[2] Indeed, defendants conceded before the tribal appellate court that "there is support in the record for at least some of the Trial Court's conclusions." (Compl. Ex. 7 at 6.)

the Community, the magistrate judge correctly observed that the result is the same.

Defendants argue that Article 3.2 restores a portion of that sovereign immunity which was waived in Article 3.1. Specifically, defendants contend that, by reiterating that "[c]onsent shall not be required for an action commenced by a Member of the Corporation to enforce the provisions of [the articles of incorporation] or the Corporation Ordinance in the Tribal Court" (Aff. of Steven F. Olson Ex. B at 2), Article 3.2 cloaks LSI with immunity from suit by the Community or its members in every forum except the tribal court.

The language of Article 3.2 will not bear defendants' construction. The purpose of Article 3.2 is to grant LSI the power to waive that immunity which was conferred upon it in Article 3.1. The Community spoke clearly and unequivocally regarding the scope of LSI's sovereign immunity in Article 3.1. If the Community had wished to leave intact LSI's sovereign immunity from suits brought by its members in federal court, it could have amended Article 3.1 by inserting the words "in tribal court" between the words "actions" and "against," or by dealing separately with LSI's immunities as against individual members and LSI's immunities as against the community as a whole. For whatever reason, the community chose against limiting its members' litigation options. Therefore, the court holds that sovereign immunity provides defendants no defense with respect to plaintiff Prescott's claims.

Because the magistrate judge did not reach the question of the existence of the ERISA plans in her report and recommendation, she did not fully address the question whether defendants waived their immunity from suit

in summary plan descriptions ("SPDs") which, as the tribal court found, LSI distributed to participants in the plans. (Compl. Ex. 6 at 10.) The magistrate judge did observe, however, "striking language" in some of the SPDs that weighed in favor of a finding of waiver. (R & R at 35.)

Defendants argue that the SPDs "are not legally operative documents" and therefore could not waive LSI's sovereign immunity. (Defs.' Obj. at 8.) That contention has no merit. "Recognizing that employee benefit plans are usually lengthy and highly technical documents, Congress required plan administrators to furnish SPDs to each plan participant and beneficiary." *Jensen v. SIPCO, Inc.,* 38 F.3d 945, 952 (8th Cir. 1994); *see also* 29 U.S.C. § 1022(a). SPDs therefore facilitate "adequate disclosure to employees," which is "one of ERISA's major purposes." *Jensen,* 38 F.3d at 952. "Because of the importance of disclosure to [ERISA's] statutory regime," courts apply a rule of construction to SPDs under which "an SPD provision prevails if it conflicts with a provision of a plan." *Id.* at 952. It is, therefore, quite possible that language contained in an SPD could operate to effect a waiver of LSI's sovereign immunity.

In order for a waiver of tribal sovereign immunity to be effective, it must be clear and unequivocal. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978). As the magistrate judge rightly observed, however, waiver does not require "the invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." *Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota,* 50 F.3d 560, 563 (8th Cir. 1995). With those principles in mind, the court examines the language of the SPDs. Three of the SPDs, those applicable to the LSI Life Insurance Plan, the

LSI Separation Pay Plan and the LSI Supplemental Retirement Plan, each contain the following statements:

1. "[I]f you request materials from the Plan and do not receive them within 30 days, you may file suit in a federal court." (Compl. Ex. 1 at 3; Compl. Ex. 2 at 4; Compl. Ex. 3 at 5.)

2. "If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court." (Compl. Ex. 1 at 3; Compl. Ex. 2 at 4; Compl. Ex. 3 at 5.)

3. "If it should happen that plan fiduciaries misuse the Plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor or you may file suit in a federal court." (Compl. Ex. 1 at 4; Compl. Ex. 2 at 4; Compl. Ex. 3 at 5.)

The phrase "you may file suit in a federal court" leaves little open for interpretation. It is clear, it is unequivocal, and it has legal effect. Therefore, the court holds that LSI has waived its sovereign immunity with respect to the LSI Life Insurance Plan, the LSI Separation Pay Plan and the LSI Supplemental Retirement Plan as to the claims of all plaintiffs.

Waiver, however, may not be implied. *Santa Clara Pueblo,* 436 U.S. at 58; *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998). With respect to the LSI Retention Plan and the LSI Executive 457 Plan, plaintiffs have not cited, nor can the court find, any language in the SPDs that could be construed as a waiver of LSI's sovereign immunity. (Compl. Exs. 4 & 5.) The court therefore holds that LSI is immune from those

claims of plaintiffs Johnson and Riverso which arise under the LSI Retention Plan or the LSI Executive 457 Plan.

Accordingly, after conducting a *de novo* review of the file and record, the court adopts those parts of the magistrate judge's report and recommendation that are consistent with this order.

Therefore, **IT IS HEREBY ORDERED** that:

1. Defendants' motion to dismiss [Docket No. 2] is granted with respect to the claims of plaintiffs F. William Johnson and Peter Riverso against defendants Little Six, Inc., Retention Plan and Little Six, Inc., Executive 457 Plan.

2. Defendants' motion to dismiss is granted with respect to the claims of plaintiffs Johnson and Riverso against defendant Little Six, Inc., in its capacity as plan administrator for the Little Six, Inc., Retention Plan and in its capacity as plan administrator for the Little Six, Inc., Executive 457 Plan.

3. Defendants' motion to dismiss is denied with respect to all claims of plaintiff Leonard Prescott.

4. Defendants' motion to dismiss is denied with respect to the claims of plaintiffs Johnson and Riverso against defendants Little Six, Inc., Life Insurance Plan, Little Six, Inc., Separation Pay Plan and Little Six, Inc., Supplemental Retirement Plan.

5. Defendants' motion to dismiss is denied with respect to the claims of plaintiffs Johnson and Riverso against defendant Little Six, Inc., in its capacity as plan administrator for the Little Six, Inc., Life Insurance Plan, in its capacity as plan administrator for the Little Six,

Inc., Separation Pay Plan and in its capacity as plan administrator for the Little Six, Inc., Supplemental Retirement Plan.

Dated: September 30, 2003

/s/ David S. Doty
David S. Doty, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3702

Leonard F. Prescott, et al.,	*	
	*	
Appellees,	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Little Six, Inc., et al.,	*	
	*	
Appellants.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 8, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit